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2                   UNITED STATES DISTRICT COURT  
3                   WESTERN DISTRICT OF WASHINGTON  
4                   AT TACOMA

5 JAMES AND CONNIE ALDERSON,

6                   Plaintiffs,

7                   v.

8                   LANDERHOLM, P.S., et al.,

9                   Defendants.

10                   CASE NO. C15-5926 BHS

11                   ORDER GRANTING  
12                   DEFENDANTS' MOTION TO  
13                   CONTINUE, DENYING  
14                   DEFENDANTS' MOTION TO  
15                   COMPEL SETTLEMENT  
16                   AGREEMENT, AND  
17                   GRANTING IN PART AND  
18                   DENYING IN PART  
19                   DEFENDANTS' MOTION TO  
20                   COMPEL RESPONSES

21                  This matter comes before the Court on Defendants T. Randall Grove (“Grove”)  
22                  and Landerholm, P.S.’s (collectively “Defendants”) motion to compel a prior settlement  
1                  (Dkt. 19), motion to compel responses (Dkt. 21), and motion for continuance of trial date  
2                  (Dkt. 23). The Court has considered the pleadings filed in support of and in opposition to  
3                  the motions and the remainder of the file and hereby rules as follows:

4  
5                   **I. PROCEDURAL AND FACTUAL BACKGROUND**

6                  On December 21, 2015, Plaintiffs James and Connie Alderson (“Plaintiffs”) filed a  
7                  complaint against Defendants asserting causes of action for negligence and breach of  
8                  fiduciary duty. Dkt. 1. Plaintiffs allege that they hired Grove to prepare a number of  
9                  estate planning documents, including the Alderson Family Trust (“AFT”). *Id.* ¶ 11. In  
10                 2004 and 2006, Plaintiffs entered into two real estate deals in Arizona believing that

1 AFT's assets would not be at risk. *Id.* ¶¶ 14–18. After the 2008-09 recession, the bank  
2 that loaned money for the real estate deals sued the Aldersons, and the Arizona courts  
3 determined that AFT's assets could be reached to settle Plaintiffs' personal debts. *Id.* ¶¶  
4 19–31. This malpractice lawsuit followed.

5 On May 2, 2016, the Court issued a scheduling order setting trial for May 23,  
6 2017. Dkt. 17.

7 On February 16, 2017, Defendants moved to compel Plaintiffs' settlement  
8 agreement, Dkt. 19, moved to compel discovery from Plaintiffs' other attorneys, Dkt. 21,  
9 and moved for a continuance, Dkt. 23. On February 21, 2017, Plaintiffs responded.  
10 Dkts. 26, 27, 29. On March 3, 2017, Defendants replied. Dkts. 37–39.

## 11 II. DISCUSSION

### 12 A. Continuance

13 A schedule may be modified only for good cause and with the judge's consent.  
14 Fed. R. Civ. P. 16(b)(4).

15 In this case, Defendants move for a three-month continuance of the trial date. Dkt.  
16 23. Upon review of counsel's declaration, the Court finds that Defendants have  
17 established good cause to modify the schedule. Accordingly, the Court grants the  
18 motion.

### 19 B. Settlement

20 "Parties may obtain discovery regarding any nonprivileged matter that is relevant  
21 to any party's claim or defense and proportional to the needs of the case . . ." Fed. R.  
22 Civ. P. 26(b)(1). A party seeking discovery may move for an order compelling

1 production if a party fails to produce documents as requested. Fed. R. Civ. P.  
2 37(a)(3)(B)(iv).

3 In this case, Defendants move to compel Plaintiffs' settlement agreement. Before  
4 filing this action, Plaintiffs initiated an action in Arizona against attorney John Battaile  
5 ("Battaile") and his law firm. Battaile drafted documents in connection with the Arizona  
6 real estate deals. The suit ended when the parties entered into a settlement agreement.  
7 Defendants have served discovery requests on Plaintiffs for the settlement agreement, but  
8 Plaintiffs have objected to the requests. Plaintiffs argue that the agreement is not relevant  
9 because, under Federal Rule of Evidence 408, the agreement is not admissible at trial.  
10 Dkt. 26 at 2. Although the agreement may not be relevant to any issue at trial,  
11 Defendants are correct that it may be relevant to any offset in damages should the jury  
12 return a verdict in Plaintiffs' favor. Dkt. 38 at 3–4. Thus, the Court concludes that the  
13 agreement is discoverable. The Court, however, declines to grant Defendants' motion  
14 because the agreement's relevance is dependent upon a determination of liability. If  
15 Plaintiffs prove liability, then the Court will revisit the matter if Plaintiffs object to  
16 production at that juncture. At this time, the Court concludes that Plaintiffs' objection  
17 has merit and denies Defendants' motion to produce the settlement agreement as there  
18 has been no showing by the Defendants that the contents of the agreement have any  
19 relevance to the issue of liability.

20 **C. Responses**

21 Defendants originally moved to compel responses from Plaintiffs' successor  
22 attorneys. Dkt. 21. Plaintiffs objected in part because a motion to enforce of an out-of-

1 district subpoena must be filed in “the court for the district where compliance is required .  
2 . . .” Fed. R. Civ. P. 45(d)(2)(B)(i). Defendants concede these issues and have narrowed  
3 their motion to the sole issue of whether Plaintiffs waived the attorney-client privilege as  
4 to all successor attorneys. Dkt. 37.

5 “Like many other jurisdictions, Washington courts have adopted the test set out in  
6 *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975), when determining whether an  
7 implied waiver of the attorney-client privilege has occurred.” *1st Sec. Bank of*  
8 *Washington v. Eriksen*, CV06-1004RSL, 2007 WL 188881, at \*2 (W.D. Wash. Jan. 22,  
9 2007). Under *Hearn*, an implied waiver of the attorney-client privilege occurs when (1)  
10 the party asserts the privilege as a result of some affirmative act, such as filing suit; (2)  
11 through this affirmative act, the asserting party puts the privileged information at issue;  
12 and (3) allowing the privilege would deny the opposing party access to information vital  
13 to its defense. *Hearn*, 68 F.R.D. at 581.

14 In this case, the parties dispute whether privileged information is at issue and  
15 whether the information is vital to the defense. Regarding the former, the Court finds  
16 that any communication by Plaintiffs to their successor counsel involving Defendants’  
17 representations of the AFT have been put at issue. For example, if Plaintiffs told  
18 successor counsel that Defendants represented that the AFT assets were fully protected,  
19 then Plaintiffs have put this information at issue in this lawsuit. Plaintiffs allege that,  
20 when they entered the real estate deals, they were confident that the AFT assets were  
21 protected. Dkt. 1, ¶¶ 19, 21–25, 29. If this confidence was based on Defendants’  
22 representations and Plaintiffs relayed those alleged representations to successor counsel,

1 then those representations are definitely at issue in this case. Thus, the Court finds a  
2 limited waiver of Plaintiffs' privilege.

3       Regarding whether the information is necessary to the defense, the Court finds that  
4 Defendants have no other means of discovering this information. If such information  
5 exists, it exists only in the memories or files of successor counsel. Therefore, to the  
6 extent Plaintiffs have waived their privilege, the Court also finds that the information is  
7 vital to the defense of Plaintiffs' malpractice claims. The Court grants Defendants'  
8 motion in part and denies it as to all other issues.

### **III. ORDER**

10 Therefore, it is hereby **ORDERED** that Defendants' motion to compel a prior  
11 settlement (Dkt. 19) is **DENIED**, motion to compel responses (Dkt. 21) is **GRANTED in**  
12 **part and DENIED in part**, and motion for continuance of trial date (Dkt. 23) is  
13 **GRANTED**. The scheduling order is **STRICKEN**, the matter is set for trial on the  
14 Court's September 5, 2017, calendar, and the Clerk shall issue a new, abbreviated  
15 scheduling order consistent with the new trial date.

16 Dated this 27<sup>th</sup> day of March, 2017.

  
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**BENJAMIN H. SETTLE**  
United States District Judge